

Supreme Court, U.S.  
FILED

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RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

October Term, 1978

**No. 78-1369**

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

*Appellants,*

*against*

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON AMBACH, as Commissioner of Education of the State of New York,

*Appellees,*

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

*Intervening Parties-Appellees.*

**APPENDIX**

LEO PFEFFER  
15 East 84th Street  
New York, New York 10028  
(212) 879-4500  
*Attorney for Appellants*

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**Docket Entries**

DATE	PROCEEDINGS
6-20-74	Filed complaint and issued summons.
7- 3-74	Filed Notice of Motion to Intervene as a deft. by Gene Crescenzi. Ret. Sine Die
7- 9-74	Filed summons and marshals return. Served: Arthur Levitt on 7-2-74 Ewald B. Nyquist on 7-3-74.
7-18-74	Filed Affidavit in opposition to motion to inter- vene by Jean M. Coon.
7-18-74	Filed defts' Answer
10-11-74	Filed Memo. End. on motion dtd. 7/3/74. Motion is denied without costs. So Ordered Ward J. (mailed notice)
10-18-74	Pre-Trial Conference Held by Ward
11-13-74	Filed affidavit and notice of motion for leave to intervene by Horace Mann Barnard School, La Salle Academy, Long Island Lutheran High School, St. Michael School & Yeshivah Ram- bam. ret. 11/26/74.
11-13-74	Filed Memorandum of law of Horace Mann Bar- nard School, La Salle Academy, Long Island Lutheran High School, St. Michael School & Yeshivah Rambam in support of motion to in- tervene.
11-27-74	Filed Memo. Endd on motion dtd. 11/13/74. Mo- tion Granted. Submit Order. So Ordered Ward J. (mailed notice)

*Docket Entries*

DATE	PROCEEDINGS
12-12-74	Filed Order that Horace Man Barnard School, La Salle Academy, Long Island Luthern High School, St. Michael School & Yeshivah Rambam are granted leave to Intervene in this action as a party deft. & that the proposed Answer of Intervenor-defts. heretofore served on all other parties be filed as the answer to pltffs. complaint & this action be amended to read as indicated. Ward J. (mailed notice)
2-18-75	Filed Pltffs. affidavit and notice of motion to convene 3 Judge Court. ret. 2/25/75.
2-28-75	Filed Memo. End. on motion dtd. 2/18/75. Motion granted. No Opposition. Settle Order on notice. Ward J. (mailed notice)
3-20-75	Filed Order that the motion to convene a 3 Judge Court pursuant to 28:2281, 2284 is granted. Ward J. (mailed notice)
4-10-75	Filed Affidavit of Service by Daniel F. Houlihan on 4/9/75.
4-10-75	Filed Responses of Intervenor Dft. La Salle Academy to Pltffs. interrogs.
4-10-75	Filed Responses of Intervenor Deft. Horace Mann Barnard School to Pltffs. interrogs.
4-10-75	Filed Responses of Intervenor Deft. Long Island Lutheran High School to Pltffs. Interrogs.
4-10-75	Filed Responses to Intervenor Deft. St. Michael School to Pltffs. Interrogs.
4-10-75	Filed Responses of Intervenor Deft. Yeshivah Rambam to Pltffs. Interrogs.
6-27-75	Filed Brief for Defts.

*Docket Entries*

DATE	PROCEEDINGS
6-27-75	Filed Answers to interrogs. by deft. Ewald B. Nyquist, as Commissioner of Education of State of New York.
7- 7-75	Filed Pltffs. Brief.
7-17-75	Filed Brief for Intervenor-Defendants, by Davis, Polk & Wardwell Attys for Intervenor Defts.
10-15-75	Filed Order designation of Judges—I hereby designate the following judges, Hon. Robert J. Ward, Hon. Walter R. Mansfield, USCA, & Lawrence W. Pierce & that this order be filed in the Southern District Court of NY. Kaufman Ch. J. of the USCA. (mailed notice)
3-11-76	Fld Order of Ch. J. Kaufman designating Judge Knapp to replace Judge Pierce to hear and determine this action. . . . Kaufman, Ch. J.
4- 1-76	Fld Order of Kaufman Ch. J. USCA. . . . Judge Lasker to serve in place and stead of Judge Knapp.
4-28-76	Fld Pltffs' Interrogs to Intervening defts.
4-28-76	Fld Pltffs' Interrogs to the defts.
5- 5-76	Filed transcript of record of proceedings dated 3-31-76
6-21-76	Fld Opinion from Three Judge Court #44613. . . . Accordingly, we hold that Chapter 507, as amended by Chapter 508, is unconstitutional to the ext that it authorized the allocation of funds to sectarian schools and we enjoin the application of the act to such schools . . . Settle Judgment on Notice. . . . Mansfield, C.J. & Lasker, J. and Ward, J. mn.
6-23-76	Filed transcript of record of proceedings dated 3-31-76

*Docket Entries*

DATE	PROCEEDINGS
7-26-76	Filed Judgment and Order of Three Judge Court —Ordered, Adjudged and Decreed, that That Chapter 507, as amended by Chapter 508, of 1974 Laws of New York is unconstitutional to the extent that it authorizes the allocation of funds to sectarian schools, and defts. are hereby permanently enjoined from applying said Act to such Schools. Judge W.R. Mansfield, Judge M. Lasker, and Judge R.J. Ward. Judgment Entered Clerk—7-28-76 mn
8- 5-76	Fld Consent to Change Atty for an intervenor deft Yeshivah Rambam . . . from Polk & Wardwell Esqs. to the incoming atty Dennis Rapps . . . So Ordered Ward, J. mn
9-21-76	Filed notice of appeal to the Supreme Court of the U.S.A. by Intervenor-Deft Yeshivah Rambam, from the Three-Judge District Court judgment ent. 7-26-76, from each & every part of said judgment.
9-23-76	Filed notice of appeal to the Supreme Court of the United States, by intervenor defts (La Salle Academy, Long Island Lutheran High School & St. Michael School), from the Judgment entered on 7-28-76.
11- 1-76	Filed defts & intervenor-defts. (La Salle Academy, Long Island Lutheran High School, St. Michael School & Yeshivah Rambam) having filed notices of appeal to the Supreme Court of the United States from the Judgment of the Court it is Ordered that the Clerk of the Court is authorized & directed to transmit to the Clerk of the Supreme Court of the U.S. all the records filed in the office of the Clerk of this Court. Ward, J. N/M

*Docket Entries*

DATE	PROCEEDINGS
11- 9-76	Filed notice that record on appeal has been Certified & transmitted to the Supreme Court of the U.S.
8- 9-77	Filed True Copy of order from U.S. Supreme Court it is ordered and adjudged that the judgment of the said U.S. District Court in these causes be and the same is hereby vacated and that these causes be, and the same are hereby remanded to the U.S. District Court for the S.D.N.Y. for further consider action in light of Wolman v. Walter, . . . Clerk. U.S. Supreme Court Wash. D.C. m/n. (to ea.)
8-24-77	Filed Pltffs. affdvt. and notice of motion for an order granting a preliminary injunction enjoining & restraining the defts. Arthur Levitt, as Comptroller of the State of N.Y. and Ewald B. Nyquist as Commissioner of Education of the State of N.Y. pending the trial of the issues. Ret. 9-6-77.
8-24-77	Filed Pltffs' memorandum of law in support of motion for preliminary injunction.
9- 6-77	Filed Intervenor-Defts' Affidavit in opposition to pltffs' motion for preliminary injunction.
9- 6-77	Filed Intervenor Defts' Memorandum in opposition to Pltffs' motion for preliminary injunction.
9- 6-77	Filed Affidavit on behalf of Defts' Levitt & Nyquist.



*Docket Entries**Docket Entries*

DATE	PROCEEDINGS
9-15-77	Filed Interim order (Three-Judge Court) Accordingly, it is ordered that during pendency of this lawsuit, any funds apportioned by the Commissioner of Education to any & all sectarian schools seeking reimbursement payments pursuant to Chapter 507, Etc. shall be paid to & held by the Comptroller of the State of N.Y. in escrow, subject to the condition that no further payments will be made by the Comptroller out of such funds to any sectarian school until a final decision is rendered on the merits of this lawsuit, or until further order of this court . . . Etc. & that the parties include with the stipulation of facts to be filed on or before 9-27-77, a precise description of the method used to compute the amounts apportioned to schools seeking payments under Chapter 507 . . . Etc. Mansfield, C.J.; Lasker, J.; Ward, J. m/n
9-27-77	Filed Stipulation of facts between parties.
9-29-77	Filed defts. affdvt. of Herbert D. Brum.
1-27-78	Filed Pltff. Affidavit of Service of memorandum of law.
1-27-78	Filed Pltffs' memorandum of law pursuant to interim order.
1-30-78	Filed Defts & Intervenor-defts Brief.
12- 2-77	Filed transcript of record of proceedings dated 9-12-77
12-12-78	Fld Three Judge Court's Opinion #47973. . . . For the foregoing reasons we conclude that Chapter 507, as amended, does not violate the Establishment Clause . . . Settle Judgment on notice. . . . Mansfield, C.J., Lasker DJ. . . . I dissent in a separate attached opinion. . . . Ward, J. mn

DATE	PROCEEDINGS
12-20-78	Fld Judgment. . . . Ordered . . . that the complaint be & it hereby is, dismissed on the merits. . . . Mansfield, USDJ, Lasker, J., & Ward, J. . . . Judg. ent. 12-20-78. . . . Clerk mn
1-30-79	Fld State Defts' Order to show cause . . . why the judgment entered on 12-30-78 should not be resettled . . . etc. . . . Ret: 2-2-79 at 3:00 pm in room 519 before Judge Ward, J.
1-24-79	Fld Pltffs' Notice of appeal to the United States Supreme Court . . . from the Judgment entered in this action on 12-20-78 dismissing the complaint herein on the merits.
2- 1-79	Fld Intervenor's deft's memorandum in response to Order to Show cause
2- 2-79	Hearing begun & concluded motion for clarification of the Judgment. . . . Motion disposed of in accordance with oral decision rendered this day. Pltffs' to post bond in the sum of \$5,000.00 within 10 days. . . . Settle order on notice. . . . (O & A)
2- 5-79	Fld memo-end on the back of State Deft's OSC Dated 1-30-79. . . . Motion disposed of in accordance with oral decision rendered this date. . . . Settle order on notice. . . . Ward, J. mn (O & A)
3- 7-79	Fld Bond in the am't of \$5,000.00 for undertaking of the costs on appeal. . . . Bond #2524850 . . . National Surety Corp., Approved as to form & sufficiency Clerk

*Docket Entries*

## DATE

## PROCEEDINGS

- 3-12-79 Fld Order. . . . Ordered . . . that the escrow provision of the interim order is continued in full force & effect and no payment shall be made from the escrow fund for a reasonable period of time following entry of the Judgment of this court on 12-20-78 upon the following terms & conditions. . . . The reasonable period shall continue for a period of 60 days from 2-2-79 . . . the Comptroller shall maintain the escrow funds in an interest-bearing account for the benefit of the payee . . . The pltf shall post a cash bond in the am't of \$5,000. . . . etc. . . . so ordered. . . . Mansfield, USCJ, Lasker, USDJ & Ward, USDJ mn
- 6-14-79 Filed transcript of record of proceedings dated 2-2-79.

**Complaint**

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action 74 Civ. 2648

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COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,  
BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B.  
ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN,  
MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV.  
ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER,  
DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER  
and CYNTHIA SWANSON,

*Plaintiffs,*

*against*

ARTHUR LEVITT, as Comptroller of the State of New York,  
and EWALD B. NYQUIST, as Commissioner of Education of  
the State of New York,

*Defendants.*

---

I. STATEMENT AS TO JURISDICTION

1. This is a civil action brought by the plaintiffs for a temporary and permanent injunction against the allocation and use of the funds of the State of New York to finance the operations of schools owned and controlled by religious organizations and organized for and engaged in the practice, propagation and teaching of religion, and to

*Complaint*

declare such use violative of the First and Fourteenth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, United States Code, Sections 1331, 1343(3), 2281, 2283, 2201 and 2202, and Title 42, Section 1983.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand Dollars (\$10,000) as more fully appears hereinafter.

4. Plaintiff Committee for Public Education and Religious Liberty (PEARL) is an association whose constituent members are: American Ethical Union; Americans for Democratic Action; Americans for Public Schools; American Jewish Committee, New York Chapter; American Jewish Congress; A. Philip Randolph Institute; Association of Reform Rabbis of New York City and Vicinity; B'nai B'rith; Bronx Park Community; Citizens Union of the City of New York; City Club of New York; Community Church of New York; Community Service Society, Committee on Public Affairs; Council of Churches of the City of New York; Episcopal Diocese of L.I., Department of Christian Social Relations; Humanist Society of Greater New York; Jewish Reconstructionist Foundation; Jewish War Veterans, New York Department; League for Industrial Democracy, New York City Chapter; National Council of Jewish Women; National Women's Conference of American Ethical Union; New York Civil Liberties Union; New York Federation of Reform Synagogues; New York Jewish Labor Committee; New York Society for Ethical Culture; New York State Americans United for

*Complaint*

Separation of Church and State; New York State Council of Churches; State Congress of Parents and Teachers, New York City District; Union of American Hebrew Congregations; Unitarian-Universalist Ministers Association of Metropolitan New York; United Community Teachers; United Federation of Teachers; United Parents Associations; United Synagogue of America, New York Metropolitan Region; Women's City Club of New York; and Workmen's Circle, New York Division. The members of these organizations who reside in the State of New York are numerous and the organizational plaintiff and each of its constituent organizations carry on activities in the Southern District of New York. The organizational plaintiff and its constituents share as common objectives preservation of freedom of religion and the separation of church and state and opposition to the use of public funds for the support of sectarian or religious schools.

5. Each of the individual plaintiffs is a citizen of the United States. Each resides in the State of New York, and some reside in the Southern District of New York. Each of them pays income and various other taxes in and to the State of New York.

6. Defendant Arthur Levitt is the Comptroller of the State of New York and is sued herein in that capacity. Defendant Ewald B. Nyquist is Commissioner of Education of the State of New York and is sued herein in that capacity.



*Complaint*

## II. FACTUAL ALLEGATIONS

7. On May 23, 1974, Governor Malcolm Wilson signed into law an act, Laws 1974, Chapter 507, entitled, "AN ACT to provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data," and an act, Laws 1974, Chapter 508, entitled, "AN ACT to amend a chapter of the laws of nineteen hundred seventy-four, entitled 'AN ACT to provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data', in relation to its applicability." (The text of the said Acts, hereinafter referred to as the Acts, is set forth herein as Appendix A and Appendix B, respectively.)

8. The sums appropriated by the State of New York to effectuate the Acts greatly exceed Ten Thousand Dollars (\$10,000) annually.

9. The Acts on their face and as construed and applied by the defendants authorize and direct payments to schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that

*Complaint*

purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

10. It is against the religious conscience of each of the individual plaintiffs to be forced by the operation of the taxing power to contribute to the propagation of religion in general and to religions to which he does not adhere in particular, or for the support or maintenance of sectarian schools or places of worship.

11. The First Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof \* \* \*."

## III. CAUSES OF ACTION

12. *First Count:* The Acts on their face and as construed and applied by the defendants, are laws respecting an establishment of religion in violation of the First Amendment of the United States Constitution in that they (a) constitute governmental financing and subsidizing of schools which are controlled by religious bodies, organized

*Complaint*

for and engaged in the practice, propagation and teaching of religion, and of schools limiting or giving preference in admission and employment to persons of particular religious faiths; (b) constitute governmental action whose purpose and primary effect is to advance religion; (c) give rise to an excessive governmental involvement in and entanglement with religion; and (d) give rise to and intensify political fragmentation and divisiveness on religious lines.

13. *Second Count*: The Acts on their face and as construed and applied by the defendants, violate the First Amendment to the United States Constitution in that they prohibit the free exercise of religion on the part of the individual plaintiffs by reason of the fact that they constitute compulsory taxation for the support of religion or religious schools.

## IV. OTHER ALLEGATIONS

14. This suit involves a genuine case or controversy between the plaintiffs and defendants.

15. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

## V. PRAYERS FOR RELIEF

16. The plaintiffs pray that the following relief be granted;

*Complaint*

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the United States Code, to declare unconstitutional and enjoin the enforcement of the Acts, as hereinbefore set forth.

(2) That the defendants and each of them be enjoined from approving or paying any funds of the State of New York to schools owned or controlled by religious bodies or organized for or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith, whether such approval or payment is purported to be made pursuant to the aforesaid Acts or otherwise.

(3) That a preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief sought herein.

(4) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

June 20, 1974.

/s/ LEO PFEFFER

Leo Pfeffer  
Attorney for Plaintiffs  
Office & P.O. Address  
15 East 84th Street  
New York, N.Y. 10028  
Tel.: (212) 879-4500

**Answer****UNITED STATES DISTRICT COURT**

FOR THE

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,  
BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B.  
ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN,  
MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV.  
ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER,  
DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER  
and CYNTHIA SWANSON,

*Plaintiffs,**against*

ARTHUR LEVITT, as Comptroller of the State of New York,  
and EWALD B. NYQUIST, as Commissioner of Education of  
the State of New York,

*Defendants.*

The defendants,<sup>4</sup> Arthur Levitt and Ewald B. Nyquist,  
by their attorney, Louis J. Lefkowitz, Attorney General of  
the State of New York, for their answer to the complaint  
herein:

1. Admit the allegations contained in paragraphs 6, 7,  
8, 11 and 14 of the complaint herein.

*Answer*

2. Deny each and every allegation contained in paragraphs 3, 12, 13 and 15 of the complaint herein.

3. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 4, 5 and 10 of the complaint herein.

4. As to the allegations contained in paragraph 1 of the complaint herein, admit that those allegations are the stated bases for the action herein and state the claims of the plaintiffs herein, but deny any conclusions as to the validity of those allegations and claims which might be drawn from those allegations.

5. As to the allegations contained in paragraph 2 of the complaint herein, admit that the jurisdiction of this Court is invoked in this action as stated therein, but deny any conclusions as to the validity of the claims in such actions which might be drawn from those allegations.

6. As to the allegations contained in paragraph 9 of the complaint herein, allege that the acts provide for payments to nonpublic schools which meet certain criteria, none of which relate to the teaching of religion or the religion of the students or faculty, or the religious affiliation of the schools. To the extent that paragraph 9 infers that the criteria listed in it constitute statutory or administrative requirements or considerations in the administration of the act, it is denied.

7. As to the allegations contained in paragraph 16 of the complaint herein, deny that Chapters 507 and 508 of the



*Answer*

Laws of 1974 are unconstitutional and further deny that plaintiffs are entitled to any or all of the relief requested therein, or to any other relief.

*For a Separate and Distinct Defense to the  
Complaint Herein, Defendants Allege:*

8. Chapters 507 and 508 of the Laws of 1974 provide for State reimbursement to nonpublic schools for the costs of administering State prepared examinations and maintaining and reporting on pupil attendance and other matters as required by the State.

9. The Supreme Court of the United States has held that states may provide nonideological services to nonpublic school pupils. The State of New York requires certain tests to be administered and information collected to assure that all schools, public and private, meet certain minimum standards of curriculum taught and faculty and requires all schools in the State of New York to participate in this testing and evaluation program. Public schools are compensated for this service through State aid payments. Nonpublic schools will be compensated as provided in these acts.

10. The Supreme Court of the United States held a similar earlier state statute invalid under the First Amendment because it included reimbursement for the costs of administering teacher prepared tests and held that because reimbursement was provided by a lump sum per pupil the whole statute had to be invalid because the permissible

*Answer*

reimbursement could not be separated out from the lump sum payment (*Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472). This statute eliminates reimbursement for teacher prepared tests and provides only for reimbursement of actual costs, thus overcoming the elements found unconstitutional in the prior statute.

WHEREFORE, the defendants pray that judgment be granted holding Chapters 507 and 508 of the Laws of 1974 constitutional, denying the injunctive relief requested in the complaint, and that defendants be granted such other and further relief as the Court may deem just and proper.

July 16, 1974

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendants

By JEAN M. COON

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Jean M. Coon  
Assistant Solicitor General  
Office and P.O. Address  
The Capitol  
Albany, New York 12224  
Telephone: (518) 474-7138



**Answer of Intervenor-Defendants**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,  
BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B.  
ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN,  
MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV.  
ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER,  
DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER  
and CYNTHIA SWANSON,

*Plaintiffs,**against*

ARTHUR LEVITT, as Comptroller of the State of New York,  
and EWALD B. NYQUIST, as Commissioner of Education of  
the State of New York,

*Defendants.*

Intervenor-defendants Horace Mann-Barnard School,  
La Salle Academy, Long Island Lutheran High School, St.  
Michael School and Yeshivah Rambam, by their attorneys,  
Davis Polk & Wardwell, on their own behalf and on behalf  
of all other schools similarly situated in the State of New  
York, for their answer to the complaint herein:

*Answer of Intervenor-Defendants*

1. Deny paragraph 1, except admit that this is a civil action, that it is purportedly brought on behalf of the plaintiffs named in the complaint and that it seeks preliminary and permanent injunctions.

2. Deny paragraphs 2 and 3.

3. State that they are without knowledge or information sufficient to form a belief as to the truth of paragraphs 4 and 5.

4. Admit paragraphs 6 and 7.

*Exhibit A*

5. State that they are without knowledge or information sufficient to form a belief as to the truth of paragraph 8.

6. Deny paragraph 9.

7. State that they are without knowledge or information sufficient to form a belief as to the truth of paragraph 10.

8. Admit paragraph 11.

9. Deny paragraphs 12, 13, 14 and 15.

*First Affirmative Defense*

10. This court lacks jurisdiction over the subject matter of this action.

*Answer of Intervenor-Defendants**Second Affirmative Defense*

11. The complaint fails to state a claim upon which relief can be granted.

*Third Affirmative Defense*

12. Plaintiffs' action seeks relief in violation of the right to the free exercise of religion, as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the Constitution of the State of New York.

*Fourth Affirmative Defense*

13. Plaintiffs' action seeks relief in violation of the right to the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the Constitution of the State of New York.

*Fifth Affirmative Defense*

14. Plaintiffs' action seeks to deprive intervenor-defendants of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the Constitution of the State of New York.

WHEREFORE, intervenor-defendants demand judgment dismissing plaintiffs' complaint and granting to said inter-

*Answer of Intervenor-Defendants*

venor-defendants such other and further relief as may be just.

Dated: New York, New York  
November 12, 1974

DAVIS POLK & WARDWELL

By RICHARD E. NOLAN

A Member of the Firm  
Attorneys for Intervenor-  
Defendants  
1 Chase Manhattan Plaza  
New York, New York 10005  
Tel.: 422-3400

**Stipulation of Facts**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

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COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,  
BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B.  
ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN,  
MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. AR-  
THUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER,  
DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER  
and CYNTHIA SWANSON,

*Plaintiffs,*

*against*

ARTHUR LEVITT, as Comptroller of the State of New York,  
and EWALD B. NYQUIST, as Commissioner of Education of  
the State of New York,

*Defendants,*

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG  
ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and  
YESHIVAH RAMBAM,

*Intervenor-Defendants.*

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IT IS HEREBY STIPULATED AND AGREED by and between  
the undersigned, attorneys for all of the parties hereto, as  
follows:

*Stipulation of Facts*

1. Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York\* became law on May 23, 1974.

2. On June 20, 1974, the complaint was filed herein, seeking a declaratory judgment that Chapter 507 is unconstitutional and a permanent injunction against its enforcement.

3. On December 11, 1974, Horace Mann-Barnard School, LaSalle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam, all of which are nonprofit, nonpublic schools located within the State of New York, were granted leave to intervene in this action as parties defendant.

4. For purposes of this action, the intervenor-defendants may be considered typical of, but not identical with, other nonpublic schools in the State of New York.

5. Each of the intervenor-defendants has performed services for which reimbursement is provided pursuant to Chapter 507.

6. Each of the intervenor-defendants has duly applied for apportionments from the State of New York pursuant to Chapter 507 for the school years 1973-74, 1974-75 and 1975-76. To date, each of the intervenor-defendants has received apportionments for the first two of these school years, namely, 1973-74 and 1974-75.

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\* Hereinafter referred to as "Chapter 507".

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7. The plaintiffs served written interrogatories upon the defendants and upon the intervenor-defendants which were responded to by defendant Nyquist on February 7, 1975 and by each of the intervenor-defendants on April 9, 1975.

8. The interrogatory responses and exhibits thereto of defendant Nyquist and of each of the intervenor-defendants have been filed with the Clerk of the Court and are a part of the record herein.

9. On March 19, 1975, the plaintiffs' motion to convene a three-judge district court was granted pursuant to 28 U.S.C. §§2281, 2284.

10. The three-judge court entered a judgment herein on July 28, 1976, permanently enjoining enforcement of Chapter 507 as applied to "sectarian schools."

11. On June 27, 1977, the United States Supreme Court vacated the three-judge court's judgment of July 28, 1976 and remanded the case for reconsideration in light of the decision in *Wolman v. Walter*, 433 U.S. —, 97 S.Ct. 2593 (1977).

12. On September 12, 1977, the three-judge court held a hearing on the plaintiffs' application for a preliminary injunction against enforcement of Chapter 507 "pending the trial of the issues herein."

13. On September 15, 1977, the three-judge court filed an Interim Order, among other things ordering that

the parties in this case promptly endeavor to prepare and will, on or before September 27, 1977, file with this

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court a stipulation of facts describing the actual services rendered by personnel in non-public schools for which reimbursement under Chapter 507 is available, including the actual duties that are or would be performed by such personnel with regard to compliance with New York's pupil evaluation program, the basic educational data system, Regents' examinations, state-wide evaluation plan, uniform procedure for pupil attendance reporting, and any other similar state prepared examinations and reporting procedures, the costs of which are reimbursable under Chapter 507. With regard to any examinations which may be graded by non-public school personnel, information shall be supplied specifying whether any review of such grading is performed by the State and, if so, the nature of such review. Wherever possible, copies of typical examinations, tests or other documents used in complying with pertinent New York State testing, evaluation and reporting requirements should be furnished to this court;

and further ordering that

the parties include with the stipulation of facts to be filed on or before September 27, 1977, a precise description of the method used to compute the amounts apportioned to schools seeking payments under Chapter 507. Information should also be supplied regarding any restrictions imposed on the use of such payments by the schools following their receipt.

14. A number of standardized tests are provided by the Education Department to help improve the educational program offered in the schools of the State of New York. All tests and accessories are offered at no charge.



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15. The Education Department has established a state-wide Pupil Evaluation Program (PEP), a full testing program required of all pupils in grades 3 and 6 in the public and nonpublic schools in New York State. Tests for pupils in Grade 9 are also available for schools that wish to use them on an optional basis. The tests used in the program are standardized reading and mathematics achievement tests developed and published by the Education Department and based on New York State courses of study:

<i>Grade</i>	<i>Name of Test*</i>	<i>No. of Questions</i>	<i>Testing Time in Minutes</i>	<i>Type of Scoring</i>
3	New York State Test in Reading—Beginning Grade 3—Form C	50	45	Hand or Machine
3	Mathematics Test for New York State Elementary Schools—Beginning Grade 3—Form C	60	50	Hand or Machine
	Pt. 1. Concepts	(26)	(20)	
	Pt. 2. Computation	(16)	(12)	
	Pt. 3. Problem Solving	(18)	(18)	
6	New York State Test in Reading—Beginning Grade 6—Form C	50	50	Hand or Machine

\* Samples of the Third and Sixth Grade tests and their scoring keys are appended hereto as Exhibits 1 through 8, respectively. Samples of the Ninth Grade tests and their instruction manuals and scoring keys are appended hereto as Exhibits 9 through 14.

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<i>Grade</i>	<i>Name of Test</i>	<i>No. of Questions</i>	<i>Testing Time in Minutes</i>	<i>Type of Scoring</i>
6	Mathematics Test for New York State Elementary Schools—Beginning Grade 6—Form C	67	60	Hand or Machine
	Pt. 1. Concepts	(27)	(20)	
	Pt. 2. Computation	(20)	(20)	
	Pt. 3. Problem Solving	(20)	(20)	
9	New York State Test in Reading—Beginning Grade 9—Form A	50	50	Hand or Machine
9	New York State Test in Mathematics—Beginning Grade 9—Form A	80	60	Hand or Machine
	Pt. 1. Concepts	(32)	(18)	
	Pt. 2. Skills	(24)	(16)	
	Pt. 3. Problem Solving	(24)	(26)	

The Education Department sends order forms for test materials to each school administrator or principal, who fills out and returns the order forms to the Department. The Department ships the test materials and the score report forms directly to the schools according to directions on the order forms. The schools administer and score the tests, fill out the score report forms, and return them to the Department.

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Schools prepare frequency distributions of the scores of their pupils and report these distributions to the State Education Department on Optical Scanning report forms.\* The distributions of scores are processed by computer, and several reports which summarize the results in conveniently interpretable form are returned to each school and central office. A copy of each report is kept on file in the Education Department, and, in addition, the Department prepares a statewide annual summary report which highlights trends and needs in various types of schools and communities throughout the state.

The reports sent to schools and school-system central offices are as follows:

<i>Name of Report**</i>	<i>Distribution</i>
1. School Testing Report	Copies to both the school and the central office
A. School Summary Table	
B. Total Score Distribution Tables	
2. Five-Year Summary Report	Copies to both the school and the central office
3. Five-or-More School Buildings Report	Copy to central office only
4. Performance Indicators in Education (PIE) Report	Copy to central office only

\* Samples of these reports are appended hereto as Exhibits 15, 16 and 17.

\*\* Samples of these reports are appended hereto as Exhibits 18 through 21, respectively.

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16. Nonpublic-school personnel perform the following services in regard to PEP tests: ordering and receiving of test materials; arranging for space, time, proctors, distribution and collection of test materials; proctoring of tests; arranging for scoring of the exams, either by machine or by hand; and collection, collation and reporting of results to the State Education Department.

17. Nonpublic schools are required to file by a specific date each year a Basic Educational Data System (BEDS) Report of Nonpublic Schools with the Bureau of Educational Data Systems of the State Education Department. A sample of such a report is appended hereto as Exhibit 22, and a sample of the Instruction Manual is appended hereto as Exhibit 23.

18. Nonpublic-school personnel perform the following services in regard to BEDS reports: collection of data requested from homeroom teachers, pupil personnel services staff, attendance secretaries and administrators; compilation and correlation of data; and filling out and mailing of report.

19. Regents examinations are end-of-course comprehensive achievement tests based on State courses of study for use in grades 9-12. They are prepared by the Education Department and may be administered only at official centers within the State of New York. The official centers include (1) all registered secondary schools and (2) other educational institutions which have been given specific approval to administer Regents examinations.

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Regents examinations are provided presently in 19 subjects: Biology; Bookkeeping and accounting II; Business law; Business mathematics; Chemistry; Earth science; English; French; German; Hebrew; Italian; Latin; Ninth year mathematics; Tenth year mathematics; Eleventh year mathematics; Physics; Shorthand II and transcription; Social Studies; and Spanish. Samples of the June 1977 Regents examinations in Biology, English and Tenth year mathematics and their scoring keys are appended hereto as Exhibits 24 through 29, respectively.

The school principal or chief administrative officer of the examination center is responsible for the enforcement of the regulations for administering Regents examinations.

Order forms for both examination booklets and scoring keys are mailed to schools well in advance of the examination periods. Complete instructions and an examination schedule are enclosed with the order forms. Orders must be returned by the date specified in the instructions.

Examination booklets are shipped directly to schools so as to arrive a few days prior to the start of the Regents examination period. The booklets are shipped in locked metal boxes, and the padlock keys are sent to the principal by first-class mail.

Generally, scoring keys are not shipped with the examination booklets; rather, they are sent to a regional center for release after the uniform statewide admission deadline for each examination. Schools must arrange to pick up scoring keys from the regional center which they designate on their order forms.

The principal must keep the examination materials in a fireproof and burglarproof safe or vault. A locked

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closet is not adequate. If possible, the materials are kept in the locked metal box in which they were received. Box keys and vault combinations must be maintained under strict security conditions to preclude access to the examination materials by students and other unauthorized persons. All school building personnel who may receive the Regents examination shipment, either during or after regular school hours, must be informed by the principal concerning the security procedures to be followed.

If a safe or vault is not available in the school, the principal must make arrangements to store the examination materials in the vault of a bank or in the vault of another school, school district building or BOCES. If such arrangements cannot be made, it is the responsibility of the principal to notify the Bureau of Elementary and Secondary Educational Testing so the examination materials can be sent to an appropriate storage facility.

Each teacher or deputy employed in the conduct of Regents examinations must read with care, prior to the examination date, the appropriate sections of the Regents Examination Manual.\* All proctors must enforce the regulations in every particular.

The principal is responsible for the rating of all papers written in the school. He is required to establish rating and checking procedures that will assure reasonable confidence in the accuracy of the ratings assigned to the examination papers.

To assist teachers in properly rating Regents examinations, the Education Department makes rating guides

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\* A sample is appended hereto as Exhibit 30.



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available, a sample of one of which is appended hereto as Exhibit 31.

At the conclusion of each examination period, the Education Department asks each school to submit for review both the passing and the failing papers written in certain subjects. In March/April and in August, schools are asked to return papers in all subjects. In January and June, a random sampling procedure is used so that the subjects selected will vary from school to school and from year to year. Under this sampling procedure, every paper written in a school is equally likely to be selected regardless of which papers may have been reviewed in previous years.

Principals are required to make the necessary arrangements to have requested papers shipped promptly to the Department in the Regents box. Only the papers in subjects requested for review are submitted. All papers not requested to be sent in for Department review must be retained in the school files for at least one year. Any or all of these papers may be called for official review during this period.

The Regents examination papers submitted by each school are very carefully reviewed at the Department by a special group of experienced classroom teachers, under the supervision of the Department staff. Apparent discrepancies or errors in school ratings are called to the attention of the principal.

Every principal who orders Regents examinations must submit a Regents Examination Report.\* The information required in the report includes, in addition to the number of

\* A sample is appended hereto as Exhibit 32.

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Regents examination papers written and the number passing in each subject, the total enrollment in each subject for which a Regents examination is offered. Every Regents examination administered, for whatever purpose, shall be included in the Regents Examination Report.

The principal must certify on this report that the rules and regulations for administering Regents examinations were faithfully observed. And each deputy and proctor must certify, by individually signing a certificate, that the rules and regulations for administering Regents examinations were faithfully observed. A sample Deputy and Proctor Certificate is appended hereto as Exhibit 33.

20. Nonpublic-school personnel perform the following services in regard to Regents examinations: ordering and receiving the examination materials; arranging and maintaining security of materials until specified date and time; arranging for space, time, proctors, distribution and collection of materials; proctoring of examinations; scoring of the examinations; collection and collation of examination materials and results; recording of grades on student records; arranging for return of examination materials to the State Education Department; and arranging for safe storage of all other examination papers.

21. The "statewide evaluation plan" referred to in Section 3 of Chapter 507 has not yet been implemented by the Education Department, and no nonpublic school has sought reimbursement for compliance therewith.



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22. Section 3211 of the New York Education Law provides, in part:

**Records of attendance upon instruction**

1. Who shall keep such record. The teacher of every minor required by the provisions of part one of this article to attend upon instruction, or any other school district employee as may be designated by the commissioner of education under section three thousand twenty-four of this chapter, shall keep an accurate record of the attendance and absence of such minor. Such record shall be in such form as may be prescribed by the commissioner of education. . . .

3. Inspection of records of attendance. An attendance officer, or any other duly authorized representative of the school authorities, may at any time during school hours, demand the production of the records of attendance of minors required to be kept by the provisions of part one of this article, and may inspect or copy the same and make all proper inquiries of a teacher or principal concerning the records and the attendance of such minors.

4. Duties of principal or person in charge of the instruction of a minor. The principal of a school, or other person in charge of the instruction upon which a minor attends, as provided by part one of this article, shall cause the record of his attendance to be kept and produced and all appropriate inquiries in relation thereto answered as hereinbefore required. He shall give prompt notification in writing to the school authorities of the city or district of the discharge or transfer of any such minor from attendance upon instruction, stating the date of the discharge, its cause, the name of the minor, his date of birth, his

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place of residence prior to and following discharge, if such place of residence be known, and the name of the person in parental relation to the minor.

23. Nonpublic schools are required to submit by July 15th of each year an Attendance Report, Form AT-6N, to the State Education Department. A sample Form AT-6N was appended as Exhibit 6 to defendant Nyquist's responses to the plaintiffs' interrogatories, and a sample is appended hereto as Exhibit 34.

24. Nonpublic-school personnel, generally an attendance secretary (or secretaries), perform the following services in regard to the State's uniform procedure for attendance reporting: collecting of attendance reports from homeroom and classroom teachers; collation of teacher reports; recording of attendance on record forms prepared to meet State specifications\*; ongoing record-keeping related to data which is required for Form AT-6N and all other State Education Department and local-school-district reports; and processing and recording of new registrations and transfers.

25. The Regents Scholarship and College Qualification Test (RSCQT) has been used as the competitive examination in awarding Regents scholarships to high school graduates residing in New York State.\*\* In addition, the RSCQT has been used as one of the required admissions

\* A sample of a State-approved Register of Attendance which nonpublic schools purchase for this purpose is submitted herewith as Exhibit 35.

\*\* For the first time, during the present school year (1977-78), a different testing program will be used.

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tests for the various units of the State University. On a broader scale, the results of the RSCQT have been used by guidance counselors to assist high school seniors seeking admissions to colleges throughout the State and country.

A new examination was prepared each year and administered in late September or early October in approved high schools of the State, under the supervision of their principals. The answer papers have been scored at the State Education Department, with the score reports sent to the schools in December.

Three different types of Regents scholarships have been awarded: the Regents college scholarship, the Regents professional education in nursing scholarship, and the Regents scholarship for Cornell University. All scholarships are limited to full-time study in approved programs situated in New York State. No assistance can be received for theological study.

The RSCQT has been divided into two parts, Part 1 administered in the morning and Part 2 in the afternoon.\*

Part 1 has been a test of general scholastic aptitude, containing questions intended to measure ability to think clearly and accurately. Candidates have been required to demonstrate capacity to perceive relationships, to reason logically and to solve problems. The questions have not been directly related to the subject matter of courses studied but depend rather upon general capacity to undertake college-level work successfully. Part 2 has been a test of subject matter achievement directly related to courses studied in high school.

\* For a description of the RSCQT, see Exhibit 36 hereto.

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To provide a general picture of the scope of the RSCQT, the subtests are indicated below, together with the approximate number of questions and credits assigned to each. Each question is worth one credit.

Part 1: General scholastic aptitude .....	150
Same-opposite .....	30
Verbal analogy .....	40
Sentence completion .....	30
Arithmetic reasoning .....	50
Part 2: Subject matter achievement .....	150
English .....	40
Social studies .....	40
Art and music .....	10
Science (general science and biology) .....	30
Mathematics (through 10th year mathematics) .....	30
Total .....	300

Each March, principals of approved high schools in New York State have been requested to order, on forms provided at that time, all materials for the examination scheduled for the following fall.

The regulations and procedures for administering the RSCQT were generally comparable to those for administering Regents examinations. However, there were important differences due particularly to the competitive nature of the examination. The question booklet had to be held secure at all times, after the examination as well as before. This meant that all question booklets, both used and unused, had to be returned to the Department immediately following the examination and that only scholarship candidates were

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permitted access to the content of the booklets during the examination.

Copies of the RSCQT Administration Manual\* have been distributed prior to each examination period. This manual contained detailed instructions for administering the examination, including instructions to be read verbatim to candidates. Each principal and proctor has been required to read the examination manual and to become thoroughly familiar with the examination procedure well in advance of the examination date.

26. Optional State high school achievement examinations,\*\* basic competency tests,\*\*\* and New York State standardized tests in Grade 6 science, 7th and 8th Grade mathematics\*\*\*\* and in physical fitness, Grades 4-12 are administered by nonpublic-school personnel in nonpublic schools. When administered, the services performed by such personnel are prescribed by the respective Department of Education test materials and instructions.

27. By October 15th of each year, secondary nonpublic schools are required to file a Secondary School Report with the Education Department. A sample of such a report is appended hereto as Exhibit 55.

\* A sample is appended hereto as Exhibit 37. Nonpublic-school personnel performed the services specified therein.

\*\* Samples and their scoring keys are appended hereto as Exhibits 38 through 41.

\*\*\* Samples and their instructions and scoring keys are appended hereto as Exhibits 42 through 48.

\*\*\*\* Samples and their direction manuals and scoring keys are appended hereto as Exhibits 49 through 54, respectively.

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28. In filing Secondary School Reports, nonpublic-school personnel perform the same tasks as are performed in regard to the BEDS reports, as specified in paragraph 18 above.

29. Section 176.2 of the Regulations of the Commissioner of Education provides:

Application for apportionment and required accounting records.

(a) A nonpublic school requesting apportionment of State monies in connection with Chapter 507 of the Laws of 1974 shall submit an application to the State Education Department in the form and at such time as the Commissioner of Education shall require. In addition such nonpublic school shall submit completed apportionment worksheets as required by the Commissioner of Education.

(b) Each nonpublic school making application for apportionment during the school year 1975-76 and thereafter shall maintain at least the following records in support of the claim for apportionment:

(1) A separate set of expenditure accounts for each required service showing the amounts which are claimed for apportionment. These shall include accounts for salaries, supplies and materials, contractual expenses and fringe benefits.

(2) A time record for each employee involved in providing services for which apportionment is requested. This record shall clearly indicate the amount of time devoted to each service.

(3) An individual salary record for each employee involved in providing services for which ap-



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portionment is requested. This record shall show gross salary, payroll deductions and net salary by payroll period. Payroll summary records yielding the same information may be maintained in lieu of individual salary records.

(4) A voucher file which shall include all paid vouchers, in whole or in part, used to substantiate costs included in the claim for apportionment.

30. The responses to the plaintiffs' interrogatories filed herein each contained copies of State Education Department Forms SA-186 and SA-187. These forms show precisely the method used to compute the amounts apportioned to the intervenor-defendants under Chapter 507 for the school year 1974-75. They are appended hereto as Exhibits 56 through 60 and are referred to for the contents thereof.

31. Chapter 507 restricts apportionments to the actual costs incurred by nonpublic schools in performing the specified required services. These costs are calculated pursuant to the Forms SA-186 and SA-187 and are reimbursed during the succeeding school year when nonpublic schools are incurring similar costs anew. As a rule, apportionments received pursuant to Chapter 507 are placed in general accounts and cease to be identifiable as to disbursement.

Dated: New York, New York  
September 26, 1977

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LEO PFEFFER, Esq.

/s/ LEO PFEFFER

Attorney for Plaintiff

15 East 84th Street

New York, New York 10028

Tel.: 879-4500

HON. LOUIS J. LEFKOWITZ

Attorney General of the State  
of New York

By JEAN M. COON

Attorney for Defendants

The Capitol

Albany, New York 12224

Tel.: (518) 474-7138

DAVIS POLK & WARDWELL

By RICHARD E. NOLAN

Attorneys for Intervenor-Defendants Horace Mann-Barnard School, La Salle Academy, Long Island Lutheran High School and St. Michael School

1 Chase Manhattan Plaza

New York, New York 10005

Tel.: 422-3400

DENNIS RAPPS, Esq.

By THOMAS J. AQUILINO, JR.

Attorney for Intervenor-Defendant Yeshivah Rambam

National Jewish Commission

on Law and Public Affairs

(COLPA)

66 Court Street

Brooklyn, New York 11201

Tel.: 875-5360